IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 75-5152

JUNIOR BYRD, Individually and for the Use and Benefit of the Minor, IVY JUNIOR BYRD, Petitioner

versus

LYKES BROTHERS STEAMSHIP COMPANY, INC., Respondent

BRIEF ON BEHALF OF LYKES BROTHERS STEAMSHIP COMPANY, INC., IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI FILED ON BEHALF OF IVY JUNIOR BYRD

May it please the Court:

The judgment of the district court below was entered on a jury verdict in favor of respondent and was affirmed by the Fifth Circuit Court of Appeals by per curiam based on its Local Rule 21.[1] In the absence of the record, which petitioner

1. Rule 21. Affirmance Without Opinion

When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the court may in its discretion enter either of the following orders: "AFFIRMED. See Local Rule 21," or "ENFORCED. See Local Rule 21."

See N. L. R. B. v. Amalgamated Clothing Workers of America, 5th Cir. 1970, 430 F. 2d 966.

had not requested the clerk of the court below to transmit to this Court prior to such request being made by respondent, this Court has nothing to review other than the allegations made in the petition as to what the record contains. Since respondent takes issue with the statement of facts presented to the Court in the petition, it has requested the clerk of the appellate court below to certify and transmit the record to this Court to enable this Court to review those portions of the record pertaining to the points of issue raised in the petition and this brief.

The salient fact in this case is that a longshoreman's cargo hook being used by one longshoreman, pulled out of a bale of bulk paper and struck the petitioner, a fellow longshoreman, causing the injury which precipitated this litigation. The fact at issue involves a determination of what caused the hook to pull out of the paper. In the petition filed with this Court, under the heading STATEMENT, petitioner has alleged: "7. The dullness of the hook was the cause of the accident . . ." and has cited the testimony of Donald Ray Hardesty, the longshoreman handling the hook, to support that allegation. The principal thrust of the petition is based on the assumption of this fact as undisputed. However, this fact was in serious dispute and was the pivotal issue in the case. Hardesty testified on other occasions while he was on the stand as follows:

Q. Well, didn't the hook just tear through the paper.

A. Didn't it just tear through?

Q. Yes.

A. Yes.

Q. It didn't slip out, did it?

A. It tore through.

Q. It tore through the paper. And whether the hook was dull or whether it was sharp, that didn't have anything to do with it tearing through the paper, did it?

A. No.

(App. 81)

He later testified, after having made the statement referred to in the petition, as follows:

Q. But, that gets us back to the question I asked a moment ago: The way this hook came out of there, the fact that it might have been dull had nothing to do with it coming out of the paper?

A. That's right.

(App. 84)

Thus, at best for the petitioner, there were factual disputes as to the condition of the cargo hook and whether such condition had anything to do with the accident. In his instructions to the jury, the trial judge fully discussed the alternatives flowing from the resolution of this dispute. The jury's verdict clearly indicates that it did not feel the hook came out of the paper because of its condition.

On petitioner's motion for a judgment n. o. v. or for a new trial, the trial judge commented:

"Well, the motion for a new trial is denied. And it's denied for the simple reason that first of all there was ample evidence in the case, **overwhelming evidence in the case, really,** to show that the condition of the hook had nothing to do with the accident." (App. 197)

Apparently the appellate court viewed this issue as a

fact question properly for determination by the jury since it affirmed the judgment without opinion.

Petitioner argues "it was clear that there was no way to use the hooks without them slipping out" (page 6 of the petition), but this statement is clearly refuted by the testimony of Hall Davis (App. 51) and of the expert longshoreman, Hymel Branch, who testified for petitioner and described the proper manner in which the hook should be used and what could cause it to come out of the paper if improperly used (App. 90, 95).

Petitioner also presents in his statement of facts and bases a portion of his argument on the allegation that another method of loading the paper was instituted subsequent to this accident (Statement No. 8, page 5, and pages 8-11). All of this is based on evidence tendered by petitioner by way of a proffer after it was ruled inadmissible by the trial court on proper grounds (App. 92, 164-165) including failure of petitioner to include the exhibits offered to support this point in the pretrial order. In any event, however, the proffered evidence consisted only of some photographs of bales of paper bound together and a statement of counsel that the bales are lowered into the hold bound in this manner (App. 165). There was no mention made of machines being used in the loading procedure.

In the last analysis, therefore, the crucial issue — what caused the cargo hook to pull through or out of the paper — was and is purely one of fact properly submitted to the jury for determination. Under our well-settled law, this finding of fact, where there was evidence offered to support it, should not be reviewed by an appellate court. Resolution of this issue by the jury was dispositive of all other issues raised in the petition. If the hook was reasonably fit for its intended use,

then the fact that there may have been loading procedures available is of no consequence.

CONCLUSION

The showing made by the petitioner does not appear to support any special and important reasons for the granting of a writ of certiorari under the guideline promulgated by this Court in Rule 19. Therefore, the petition should be denied.

Respectfully submitted:

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CERTIFICATE

I certify that three (3) copies of the above and foregoing brief were this day mailed, with adequate postage affixed and properly addressed, to H. Alva Brumfield, Esquire, attorney for Ivy Junior Byrd, petitioner.

Baton Rouge, Louisiana, August _____, 1972.

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David W. Robinson